No. 73-1923

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

JAMES O. EASTLAND, ET AL.,
Petitioners

v.

UNITED STATES SERVICEMEN'S FUND, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

NATIONAL PEACE ACTION COALITION, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, ET AL.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Petitioners

v.

PROGRESSIVE LABOR PARTY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS

HERBERT J. MILLER, JR.
NATHAN LEWIN
A. RAYMOND RANDOLPH, JR.
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D.C. 20036
Attorneys for Petitioners

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional Provisions Involved	3
Statement	3
A. The Proceedings Below	3
B. The Majority Opinion in the Court of Appeals	12
C. The Dissenting Opinion	14
Summary of Argument	15
Argument	20
I. The Activities of the Congressional Defendants in Subpoenaing Bank Records Were Protected From Judicial Interference by the Speech or Debate Clause	22
A. Subpoenaing Records and Documents Has Long Been Considered Something "Generally Done in a Session of Congress by One of Its Members in Relation to the Business Before It" and Is Therefore Protected Legislative Activity	22
B. The Speech or Debate Clause Cannot Be Disregarded on the Basis That the Congressional Activity Might Be Found Unconstitutional by a Court or Because the Subpoena Was Directed to a Third Party Who Could Be Expected to Comply	28

Page

II. The Subcommittee's Actions Were Not Transformed Into Non-Legislative Acts, Barred by the First Amendment, Merely Because Its Subpoena to the Bank Would Have Disclosed Records Relating to USSF 37

A. USSF's Claim of Associational Privacy in Bank's Records Is Tenuous and Does Not Justify a Court's Withdrawing Speech or Debate Clause Protection to Allow Civil Suits Against Congressmen and Their Aides 37

B. This Court's Decisions on Freedom of Association Do Not Support the Judgment of the Court of Appeals Authorizing Injunctions Against the Congressional Defendants to Prevent Receipt of the Subpoenaed Bank Records 41

Conclusion 45

CITATIONS

Cases:

Alexander v. *"Americans United", Inc.*, — U.S. — (94 S.Ct. 2053) 17, 18, 36, 37, 40
Barenblatt v. *United States*, 360 U.S. 109 35
Bates v. *City of Little Rock*, 361 U.S. 516 41
Bob Jones University v. *Simon*, — U.S. — (94 S.Ct. 2038) 36, 40
Branzburg v. *Hayes*, 408 U.S. 665 42
Brex v. *Smith*, 104 N.J. Eq. 386 31
California Bankers Ass'n v. *Schultz*, 416 U.S. 21 38
Chapman, In re, 166 U.S. 661 34
Cole, Application of, 342 F.2d 5 (2d Cir.), *cert. denied*, 381 U.S. 950 31
Cole v. *McClellan*, 439 F.2d 934 20
Couch v. *United States*, 409 U.S. 322 ..... 18, 38, 39
Doe v. *McMillan*, 412 U.S. 306 ..... 13, 22, 23, 24, 27, 28, 29, 35, 42, 44
Donaldson v. *United States*, 400 U.S. 517 ..... 18, 38, 39
Fischler v. *McCarthy*, 117 F.Supp. 643 (S.D.N.Y.), *aff'd*, 218 F.2d 164 (2d Cir.) 36

Page

Foster v. *United States*, 265 F.2d 183 (2d Cir.) *cert. denied*, 360 U.S. 912 38
Galbraith v. *United States*, 387 F.2d 617 (10th Cir.) .. 31
Gibson v. *Florida Legislative Investigation Committee*, 372 U.S. 539 ..... 41, 42
Gravel v. *United States*, 408 U.S. 606 ... 22, 23, 24, 30, 32, 36
Harris v. *United States*, 413 F.2d 316 (9th Cir.) 31
Hearst v. *Black*, 87 F.2d 68 (D.C. Cir.) 20, 31
Hutcheson v. *United States*, 369 U.S. 599 20
Kilbourn v. *Thompson*, 103 U.S. 168 ..... 22, 23, 24, 36, 42
Levine v. *United States*, 362 U.S. 614 31
Louisiana ex rel. Gremillion v. *NAACP*, 366 U.S. 293 .. 41
McGrain v. *Daugherty*, 273 U.S. 135 ..... 25, 27
McMann v. *Securities & Exchange Commission*, 87 F.2d 377 (2d Cir.), *cert. denied*, 301 U.S. 684 31
Missouri, Kansas & Texas Ry. Co. v. *May*, 194 U.S. 267 ..... 44, 45
NAACP v. *Alabama*, 357 U.S. 449 ..... 14, 19, 41, 42, 43
O'Donnell v. *Sullivan*, 364 F.2d 43 (1st Cir.) *cert. denied*, 385 U.S. 969 31
O'Shea v. *Littleton*, 414 U.S. 488 32
Pierson v. *Ray*, 386 U.S. 547 32
Pollard v. *Roberts*, 283 F.Supp. 248 (E.D. Ark.), *aff'd*, 393 U.S. 14 43
Powell v. *McCormack*, 395 U.S. 486 ..... 22, 23, 24
Sanders v. *McClellan*, 463 F.2d 894 ..... 13, 20
Schultz v. *Rayburn*, 350 F.2d 666 (7th Cir.) *cert. denied*, 382 U.S. 919 38
Tenney v. *Brandhove*, 341 U.S. 367 ..... 17, 22, 23, 28, 29, 32, 35, 36, 44
United States v. *Bank of Commerce*, 405 F.2d 931 (3d Cir.) 38
United States v. *Brewster*, 408 U.S. 501 ..... 22, 23, 24, 27, 32, 44
United States v. *Cross*, 416 F.2d 1205 (8th Cir.) 38
United States v. *Johnson*, 383 U.S. 169 ..... 22, 23, 24, 30
Uphaus v. *Wyman*, 360 U.S. 72 ..... 35, 36, 41
Watkins v. *United States*, 354 U.S. 178 35

Page

CONSTITUTION AND STATUTES:

United States Constitution:

First Amendment 3, 13, 15-20, 22-24, 27-30, 32, 35, 37, 40, 42, 44

Article I, Section 6, Clause 1 (Speech or Debate Clause) 3

Internal Security Act, 50 U.S.C. § 781 *et seq.* 6
2 U.S.C. § 192 35
18 U.S.C. § 713 34
18 U.S.C. § 2387(a) 33, 34
26 U.S.C. § 6103(d)(1)(A) 41
26 U.S.C. § 6103(d)(2) 41
26 U.S.C. § 7421(a) 37
22 U.S.C. § 611 *et seq.* 33
28 U.S.C. § 1254(1) 2

MISCELLANEOUS:

S. Res. 366, 81st Cong., 2d Sess. 6
S. Res. 341, 91st Cong., 2d Sess. 6
S. Res. 478, 91st Cong., 2d Sess. 8
S. Res. 60, 93d Cong., 1st Sess., § 3(a)(5) 26
House Res. 5, 92d Cong., 1st Sess. 11
House Rule XI, Clause 11(a) 11
116 Cong. Rec. 3417 6
116 Cong. Rec. 36481 8
Hearings before the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 1st Sess. 26
Treas. Reg. 1.6033 5
Treas. Reg. 1.6033-2(a)(2)(ii)(f) 40
Hallum, *Constitutional History of England*, 307 (5th ed. 1867) 25
Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926) 25, 26, 27
I Morrison, Commager & Leuchtenburg, *The Growth of the American Republic*, 305 (6th ed. 1969) 26
Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U.Pa.L.Rev. 691 (1926) 26

Page

Sky, *Judicial Review of Congressional Investigations: Is There An Alternative to Contempt?* 31 Geo. Wash. L. Rev. 399 21
Van Altyne, *Congressional Investigations*, 15 F.R.D. 471 (1954) 26
5 Debates on the Federal Constitution 406 (Elliot ed. 1876) 23
2 Farrand, Records of the Federal Convention of 1787, p. 246 (1966 ed.) 23

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority opinion of the court of appeals (App. 46-82) [1] and the opinion of the dissenting judge (App. 82-110) are reported at 488 F.2d 1252.

In *Eastland* v. *United States Servicemen's Fund*, the June 4, 1970, opinion and order (App. 21-22) and the July 28, 1970, opinion and order (App. 34-35) of the court of appeals on respondents' application for stays are not reported.

The opinions of the district court in *Eastland* v. *United States Servicemen's Fund* denying respondent's motion for a preliminary injunction (App. 23-32) and denying a permanent injunction and respondents' motion to compel further depositions (App. 35-39) are not reported.

JURISDICTION

The judgment of the court of appeals in *Eastland* v. *United States Servicemen's Fund* (App. 111-112) was entered on August 30, 1973. The judgment in the remaining three cases was entered on October 26, 1973 (App. 113-114). On January 23, 1974, the court of appeals denied a timely petition for rehearing with a suggestion for rehearing *en banc* (App. 115-116) filed on behalf of the Congressional defendants by the United States. On April 18, 1974, Mr. Chief Justice Burger extended the time for petitioning for certiorari in all four cases to and including June 22, 1974. The petition for a writ of certiorari was filed on June 22, 1974, and granted by this Court on October 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the joint appendix filed with Petitioners' Brief on the Merits.

QUESTION PRESENTED

Whether, in four actions brought by organizations against Committees of Congress, their Chairmen, Members and staff, a court can enjoin or declare void under the First Amendment despite the Speech or Debate Clause and the separation of powers doctrine, subpoenas issued by the Committees to banks requiring the production of bank records relating to the organizations.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 6, Clause 1, of the Constitution of the United States provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House they shall not be questioned in any other Place.

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

A. The Proceedings Below

During 1970 and 1971, organizations and individuals instituted four suits in the United States District Court for the District of Columbia seeking declaratory and

injunctive relief against the enforcement of subpoenas *duces tecum* issued to banks by Congressional Committees.

In the first of these cases, *Eastland* v. *United States Servicemen's Fund* (USSF), the plaintiffs were the respondents USSF and two of its officers.[2] USSF is a corporation, incorporated on January 6, 1969, in the State of Delaware (App. 82). As a non-profit membership corporation, USSF listed in its certificate of incorporation a number of charitable and educational purposes allegedly designed "to further the welfare of persons who have served or are presently serving in the military."[3] By the Spring of 1970 the corporation's activities included establishing and funding "coffee houses" near and on 17 federal military installations and furnishing financial assistance to about 37 newspapers distributed on federal military bases around the world.[4]

At the time of its incorporation in January 1969, USSF applied to the Internal Revenue Service for tax exempt status, which the IRS granted two months later.[5] In February 1970, the IRS audited the records of USSF and thereby received substantially the same information that USSF was required to provide on its annual information tax return.[6]

The instant case arose from the following events. In March 1970, the Senate Subcommittee on Internal Security adopted a resolution stating that a *prima facie* showing had been made that USSF should be the subject of further investigation and authorizing the issuance of subpoenas in aid thereof.[7] (App. 125.)

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[2] The complaint described plaintiffs Robert Zevin and Corrinna Fales as, respectively, USSF's Secretary-Treasurer and Executive Director (App. 12).

[3] Complaint ¶ 1A. The complaint (App. 10-11) alleged that the following were among the purposes listed in the certificate of incorporation:

"1) to stimulate, develop, foster, coordinate, improve and encourage the educational opportunities of military personnel and to protect the civil rights of such persons, by:

2) Holding public meetings, providing entertainment and other recreational services for the benefit of military personnel;

3) Executing, sponsoring and encouraging research designed to improve the general welfare of military personnel;

4) Contributing to the costs of legal representation of military personnel;

5) Initiating programs, including scholarship programs, designed to further the educational opportunities of military personnel;

6) Collecting, assembling, exchanging, publishing and otherwise freely disseminating (a) to military personnel and (b) to the general public, knowledge and information relating to the improvement of all aspects of military life."

In furtherance of these purposes USSF provides funds for (a) the establishment and operation of coffee houses, which are gathering places of recreation for persons in military service as well as the providing of entertainers for military personnel; (b) the establishment and operation of newspapers which provide information particularly of interest to military personnel; (c) the supplying of educational materials such as films, books, periodicals, and entire libraries for military personnel; (d) the providing of civilian legal representation for military personnel due to the inadequacies of military justice."

[4] Testimony of Robert Zevin, in Hearing before the District Court on June 16, 1970, at pp. 88-90.

[5] *Id.* at p. 93.

[6] *Id.* at p. 94. See Treas. Reg. 1.6033-2 (1974).

[7] This resolution of March 11, 1970, named as the subject of inquiry "United Servicemen's Fund, Inc."; in a resolution passed on May 15, 1970, this was amended to name "United States Servicemen's Fund, Inc." (App. 125, 126).

Earlier, Senate Resolution 341, 91st Cong., 2d Sess. (116 Cong. Rec. 3417-3418) (1970) had authorized the Subcommittee "to make a complete and continuing study and investigation" of the administration of the Internal Security Act of 1950 and laws relating to espionage, sabotage and protection of the internal security of the United States, and the extent, nature and effect of subversive activities in the United States, including, but not limited to espionage, sabotage and infiltration by persons who are or may be under the control of foreign governments or organizations or other movements seeking to overthrow of the government of the United States by force or violence (App. 122-123).[8]

Pursuant to the foregoing authority, the Senate Subcommittee on Internal Security, over the signature of Chairman Eastland, issued a subpoena *duces tecum* to the Chemical Bank New York Trust Company, 20 Pine Street, New York, New York, on May 28, 1970,[9]

[8] Pursuant to the predecessor of this resolution (S.Res. 366, 81st Cong., 2d Sess.), the Senate Subcommittee had adopted a resolution on October 14, 1967, directing an investigation of the National Conference for New Politics and associated organizations; the resolution further provided that all hearings in connection with such investigation shall be in Executive Session except as the Chairman may otherwise direct (App. 124).

This resolution was cited and relied upon in the Subcommittee's resolution of March 11, 1970 (note 7 *supra*).

[9] The Subcommittee's original subpoena *duces tecum* to the bank, issued on April 16, 1970, was withdrawn because of a technical error concerning the organization's name (see note 7, *supra*); respondents had instituted a suit regarding that subpoena on May 14, 1970. On May 21, 1970, another subpoena to the bank was issued with a return date of May 28, 1970, but this was withdrawn at the request of the respondents. (Complaint ¶¶ III, 9-15.) (App. 13-14).

directing the bank to bring to the Subcommittee "any and all records pertaining to or involving the account or accounts of the United States Servicemen's Fund. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within your control or custody or within your means to produce." (App. 117).

On June 1, 1970, shortly before the return date of the subpoena directed to the Chemical Bank, USSF and the individual respondents filed a complaint against the Chairman, Members and Chief Counsel of the Subcommittee on Internal Security[10] and the bank (App. 10). The complaint alleged *inter alia* that the "sole purpose" of the subpoena was to "harass, chill, punish and deter" respondents in the exercise of their First Amendment rights and that contributions to USSF from private individuals and foundations will diminish if the bank complies with the subpoena. Respondents sought an injunction restraining the bank from complying with the subpoena and enjoining the Subcommittee Chairman, Members and Chief Counsel from seeking to enforce the subpoena by using the power of contempt, and a declaratory judgment that the subpoena was void and illegal under the Constitution. (App. 16-19).

When the district court refused to issue a temporary restraining order, the court of appeals, with one judge dissenting, ordered a stay in the enforcement of the subpoena pending a hearing on respondents' applica-

[10] The complaint named as defendants sued in their official capacity Chairman James O. Eastland, Senators John L. McClellan, Sam Ervin, Birch Bayh, Thomas J. Dodd, Robert C. Byrd, Strom Thurmond, Marlan W. Cook, Robert P. Griffin and Hugh Scott, and Chief Counsel J. G. Sourwine (App. 12-13).

tion for an injunction (App. 21-22). After a hearing, District Judge Oliver Gasch, in an opinion dated June 30, 1970, denied respondents' motion for a preliminary injunction and denied petitioners' motion to dismiss the complaint (App. 23-32). The court of appeals then stayed enforcement of the subpoena until final disposition on appeal, but urged the district court to allow the case to go to final judgment in the interim (App. 34-35).

Thereafter, respondents noticed the depositions of Chairman Eastland and the Subcommittee's Chief Counsel, but the district court, holding that the Senators had personal immunity under *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), ordered them dismissed as defendants (App. 19-20). When respondents sought to depose the Chief Counsel, who remained as a defendant, the Senate passed S. Res. 478, 91st Cong., 2d Sess., 116 Cong. Rec. 36481-82 (App. 126-130), allowing the Chief Counsel to testify only in regard to matters of public record. (App. 110 n. 18). Respondents sought an order to compel further testimony. (App. 35).

In a hearing before the district court on February 23, 1971, respondents called four witnesses (two of whom had raised funds for USSF) to testify in regard to the effect on contributions to USSF. Their testimony indicated that some donors desired to remain anonymous;[11] that these donors sought to hide their identity by delivering contributions in the form of cash, cashier's checks[12] or checks drawn on corporations that were "fronts for an individual";[13] and that these donors desired anonymity because they were "modest";[14] or feared "for their professional positions or their job" or "their tax position";[15] or because they did not wish their name to become known to other organizations who would seek contributions from them.[16]

[11] Appellants' App. A194, A199-A200 ("Appellants' App." refers to the appendix filed in the court of appeals by respondents in *USSF*).

[12] *Id.* at A195.

There was also testimony that after the Subcommittee issued its subpoena in the Spring of 1970, USSF lost a donor who had been giving $10,000 a year[17] and that, in general, since fundraising was very competitive "anything which leads people to deflect their contribution from one organization to another can be fatal to a fundraising effort of the particular organization."[18] However, the testimony also showed that at the time of the Subcommittee's subpoena—June 1970—USSF had received a letter from the Internal Revenue Service questioning USSF's tax-exempt status; that this was mentioned in the *New York Times* a few days later; and that lack of a tax exemption would "certainly" have an adverse impact on USSF's contributions.[19] (USSF's tax-exempt status was not revoked.)[20] The witnesses said in addition that the fact

[13] *Id.* at A217.

[14] *Id.* at A207.

[15] *Id.* at A207-A208.

[16] *Id.* at A213.

[17] *Id.* at A202, A204.

[18] *Id.* at A212.

[19] *Id.* at A231, A234.

[20] *Ibid.* Also, counsel for USSF stated in oral argument in the court of appeals on January 15, 1974, that USSF was at that time a tax-exempt organization. Transcript of Oral Argument, at p. 4.

that an organization becomes the subject of a Congressional investigation can be—and, indeed, has been—utilized successfully as a fundraising device.[21]

On October 21, 1971, eight months after the foregoing hearing, the district court issued an opinion denying a permanent injunction and rejecting respondents' motion to compel the further testimony of Chief Counsel Sourwine (App. 35-39).

Respondents then appealed this final order, which appeal the court of appeals combined with the pending appeal from the trial court's denial of a preliminary injunction (App. 55). With the *USSF* case, the court of appeals also combined for argument and decision three cases[22] in which suits had been brought against the Committee on Internal Security of the House of Representatives by organizations seeking to enjoin the enforcement of subpoenas *duces tecum* directing various banks to produce records relating to those organizations (App. 48).[23]

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[21] *Id.* at A215, A224.

[22] *Progressive Labor Party, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-1609); *National Peace Action Coalition, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-1693); *Peoples Coalition for Peace and Justice, et al.* v. *House Internal Security Committee, et al.* (C.A. No. 71-2034).

[23] The subpoenas were substantially the same and directed the banks to furnish (App. 118-123):

> Copies of records relating to the accounts . . . including, but not limited to: all signature cards since inception; monthly statements from inception, current checks deposited to the accounts, any available checks drawn or deposited to the accounts, deposit slips, correspondence and memoranda.

See also J. App. 8-10, 49, 62, 102-103 ("J. App." refers to the Joint Appendix (Consolidated) filed in the court of appeals in the

In each of the three House Committee cases, the plaintiffs (respondents in this Court) were the named organization and various officers of the organization;[24] in the *Progressive Labor Party* and *National Peace Action Coalition* cases, plaintiffs also included "John Doe" and "Richard" or "Mary Roe"—pseudonyms representing anonymous contributors to and members of the organizations.[25] Defendants in each of these cases—now petitioners in this Court—were the House Committee on Internal Security and its Chairman, Members, Chief Counsel and Investigator.[26] Also named as a defendant in each case was the bank to which the subpoena had been directed.

House Committee cases). The subpoenas directed the Committee Investigator "to serve and return."

The resolutions of the House Committee on Internal Security (a standing committee of the House of Representatives, see House Res. 5, 92d Cong., 1st Sess., Jan. 22, 1971, House Rule XI, Clause 11(a)) authorizing investigations of the respondent organizations are reprinted in the Consolidated Brief for Defendant-Appellants in the court of appeals, at pp. 6-8.

Prior to institution of the suits in the *National Peace Action Coalition* and *Peoples Coalition for Peace and Justice* cases, the bank had already partially complied with the subpoenas by providing the Committee with checks, ledger sheets and other documents relating to the organizations. J. App. 33-34, 77-78.

[24] The Progressive Labor Party described itself as a "National political organization dedicated to the supplanting of the capitalist economic system by a socialist economic system" (J. App. 2). The National Peace Action Coalition and the Peoples Coalition for Peace and Justice described themselves as national organizations dedicated to the immediate termination of the war in Southeast Asia (J. App. 31, 75).

[25] See J. App. 2-3, 31-32, 75-76.

[26] In the *Progressive Labor Party* case, however, the Members named as defendants were only those Representatives who were also Members of the Subcommittee of the House Internal Security Committee authorized to investigate the Progressive Labor Party (J. App. 3).

These three suits involving the House Committee were on appeal from preliminary injunctions entered by the district court pending the decision by the trial court in *USSF*.[27] The constitutional claims raised in each of the three complaints, which sought declaratory and injunctive relief,[28] were the same as those raised in the *USSF* complaint and the district court therefore entered the preliminary injunctions in reliance on the stay orders previously issued by the court of appeals in *USSF*.[29]

B. The Majority Opinion in the Court of Appeals

Discussing only the facts involved in the *USSF* case, a majority of the court of appeals,[30] with Judge MacKinnon dissenting, reversed the judgment of the trial court in *USSF*, affirmed the orders granting preliminary injunctions in the remaining cases and remanded all four cases for further proceedings.[31]

The court majority rejected the argument that courts could not interfere by injunctive remedies with duly

[27] The district court, on April 29, 1971, in the *Progressive Labor Party case*, on May 21 and May 28, 1971, in the *National Peace Action Coalition* case, and on May 28, 1971, in the *Peoples Coalition for Peace and Justice* case, entered preliminary injunctions enjoining the banks from complying with so much of the issued subpoenas as required the banks to produce current checks deposited to the organizations' accounts and any available previous checks drawn or deposited to the accounts (App. 39-45).

[28] The National Peace Action Coalition and the Peoples Coalition for Peace and Justice sued for damages as well (J. App. 5-7, 34-37, 78-81).

[29] In all four cases the United States Department of Justice represented the Congressional defendants in the courts below.

[30] Chief Judge Bazelon and Judge Tuttle, sitting by designation.

[31] See the judgments entered by the court of appeals, at App. 111-114.

authorized legislative subpoenas. The court reiterated its ruling in *Sanders* v. *McClellan*, 463 F.2d 894 (1972), that an alleged "chilling effect" on First Amendment rights of a witness subpoenaed by a Congressional Committee does "not outweigh the right of the Subcommittee, acting under valid congressional authority, to make its inquiries * * * free of prior judicial interference" (463 F.2d at 903), but nevertheless held that the bar against prior judicial interference does not apply when the subpoena is addressed to a third party because the complaining parties have "no alternative means to vindicate their rights" other than by an action to enjoin the subpoena (App. 60).

The court of appeals further held that while the Speech or Debate Clause protects Members of Congress from suit for *authorizing* a subpoena, it does not protect either Members or employees of Congress from suit for *issuing* or *serving* an "unconstitutional" subpoena (App. 67), apparently because such unconstitutional acts are outside the "legislative sphere" within the meaning of *Doe* v. *McMillan*, 412 U.S. 306 (1973) (App. 77-78). Although the court was unable to identify any act performed by any Member of Congress or the Chief Counsel in the *USSF* case falling outside the "legislative sphere," it reversed the judgment dismissing the Senators as defendants and called for further hearings to determine whether any Member's "presence in the litigation is unavoidable if a valid order is to be entered by the court to vindicate rights which would otherwise go unredressed" (App. 80).[32]

[32] In the three House Committee cases, the Court affirmed the preliminary injunctions entered by the district court but remanded the cases for further consideration in light of its opinion in *USSF* (App. 113-114).

In the view of the majority of the court of appeals, "the forced surrender by the bank of the subpoenaed records in response to the subpoena would invade the constitutional rights of the plaintiffs" (App. 78). In reaching this conclusion the majority recognized the "undoubted power of Congress to conduct committee investigations" (App. 68), and did not question that the subpoena in the *USSF* case was a valid exercise of that power apart from its claimed effect on the First Amendment rights of the plaintiffs. Rather, the court held that USSF was a "controversial" organization, that exposure of the names of contributors to USSF would deter contributions, and that this showing alone established a violation of the First Amendment rights of the respondents and rendered the subpoena unconstitutional.[33]

C. The Dissenting Opinion

Judge MacKinnon dissented, insisting that the court's decision was "a gross abuse of its judicial powers" (App. 107). He found no constitutional violation in the requests for bank records, distinguishing the line of cases beginning with *NAACP* v. *Alabama*, 357 U.S. 449 (1958), on the grounds that "none of them on their facts makes a showing that the lists were requested for a proper purpose" (App. 94). He concluded that since the subpoena was a valid exercise of legislative power, the "separation of powers deprives the courts of any further jurisdiction in the matter" (App. 107). He also disagreed with the majority's

[33] In a consolidated supplemental brief filed after the argument in the court of appeals, respondents stated that the court might lack jurisdiction over the banks and that in any event injunctions solely against the banks would not adequately protect their First Amendment rights.

conclusion that the Senators should be reinstated as defendants and with the authorization for compulsory testimony to be obtained from the Chief Counsel (App. 110 & n.18).

SUMMARY OF ARGUMENT

I.

A.

This Court's prior decisions in regard to the Speech or Debate Clause establish that one of the purposes of the Clause is to prevent legislators from being held accountable before a possibly hostile judiciary; that their conduct is protected even if it might otherwise be considered unconstitutional; that the Clause insulates from judicial scrutiny anything generally done by a Congressman in relation to the business before the House; and that the protection of the Clause extends not only to Congressmen but also to their aides insofar as the conduct of the latter would be protected if performed by the Member himself.

The challenged Congressional activities here—subpoenaing bank records—fall squarely within the foregoing definition of conduct protected by the Clause. From the first Parliamentary committees in the late 1600's, through the legislative committees established early in this nation's history, up to the present operations of Congress, the legislative acts of requiring the production of documents by compulsory process have been considered a necessary attribute of the very power to legislate. As such, the Congressmen (and their aides) who perform these acts cannot be forced to defend private civil suits challenging the constitutionality of such activities.

B.

To hold that the Clause provides no protection to Congressmen if their actions are found by a court to violate some other constitutional provision is to emasculate the Clause itself. It would mean that the Clause bars the judiciary from holding a Congressman accountable only when the Congressman would otherwise prevail on the merits, which of course is no protection. Moreover, this Court has held that legislators cannot be forced to defend actions upon the conclusions of a pleader.

Respondents argue that the courts must be permitted to intervene when subpoenas are directed to a third party who can be expected to comply and when such compliance would invade their constitutional rights. That the Speech or Debate Clause, if applied, would preclude judicial scrutiny is not a reason for holding the Clause inapplicable; it is instead merely a restatement of the principle established by this Court that the Clause confers immunity regardless whether a court might find the legislators' conduct "unconstitutional."

Moreover, although this Court has held that the Clause precludes judicial inquiry into the purposes or motives underlying legislative acts, a trial such as that contemplated by the court below necessarily entails such an inquiry since the mere fact that a bank's records regarding a corporation have been subpoenaed does not render the subpoena unconstitutional or supply a reason for judicial intervention. Thus, when an independent federal agency or the Internal Revenue Service or a grand jury subpoenas bank records of a customer, the courts have held that the customer lacks standing to contest the subpoena. This being so in regard to agencies of the Executive and Judicial Branches, it is plainer still that the courts may not

intervene to block subpoenas for bank records from the Legislative Branch, whose Members alone are expressly granted immunity by the Constitution.

Furthermore, the decision below cannot be upheld on the basis of any special circumstances regarding the Senate Subcommittee's investigation. There is nothing in this record—in the authorizing resolutions, in the nature of the inquiry, or otherwise—to indicate that this was anything but a legitimate legislative inquiry and the court majority did not suggest the contrary.

Nor does the record lend any support to respondents' claim that involved here is an attempt by the Congressional petitioners to evade court review by issuing subpoenas to banks who cannot be expected to resist and force contempt prosecutions. The subpoenas were issued to the owners and custodians of the documents and none of the courts below found any attempt to evade court review. Congress may invoke the aid of the judiciary in contempt prosecutions, but it does not follow that a Congressman's Speech or Debate Clause protection disappears when the complaining party may have no chance to defend a contempt prosecution. That was the situation in *Tenney* v. *Brandhove*, 341 U.S. 367, 371 (1951), yet this Court sustained the dismissal of the suit against the legislators despite plaintiff's claim that he had no other way to redress the alleged violation of his First Amendment rights.

As to the harm alleged by USSF, only last term this Court refused to allow courts to enjoin the IRS from revoking tax-exempt status to an organization claiming that if it could not sue for an injunction it would be irreparably harmed by the loss of donations. *Alexander*

v. "*Americans United*," *Inc.*, — U.S. — (1974) (94 S.Ct. 2053). The decision of the court of appeals in this case therefore cannot be upheld on the basis of USSF's allegations of similar harm if the bank complies with the subpoena, particularly since the bar to judicial intrusion is the Constitution itself.

II.

A.

USSF's First Amendment claims do not support withdrawal of Speech or Debate Clause protection. USSF's claim of associational privacy in the documents subject to the subpoena is tenuous at best. The records sought by the Subcommittee belonged to the bank, not USSF, and the courts in this country have never recognized a banker-customer privilege. Indeed, this Court has held that when the IRS issues a summons to a third party for checks, vouchers, bank statements and the like relating to a taxpayer, the taxpayer has no right to intervene and contest the summons. *Donaldson* v. *United States*, 400 U.S. 517 (1971); *Couch* v. *United States*, 409 U.S. 322 (1973).

Moreover, the bank's records regarding its transactions with USSF are doubtless familiar to the bank and its employees. While USSF argues that this information must be kept secret from the Senate Subcommittee to protect the identity of USSF's donors, the fact is that USSF has already reported such information about its contribution on its federal tax returns. And those returns are currently available, upon request to the Secretary of the Treasury, to at least three other committees of Congress.

B.

Decisions such as *NAACP* v. *Alabama*, 357 U.S. 449 (1958), do not sanction judicial interference with the Congressional subpoenas at issue here. The bank's records are not the equivalent of the confidential membership lists of the NAACP, which were sought directly from the NAACP and which the NAACP evidently had not disclosed to other state government agencies or private entities. Moreover, in the *NAACP* v. *Alabama* line of cases the State authorities sought the lists for purposes that were not germane to their asserted need for them, which is not the situation here. In any event, when private civil actions are instituted against Congressmen, the Speech or Debate Clause prevents the courts from imposing liability on the Congressional defendants on the basis that, in the court's view, their legislative actions were not wholly necessary to their legislative task.

Nor can the decision below be upheld on the ground that Congressional subpoenas may not be issued to banks for records relating to "controversial" organizations. A distinction between "controversial" and "noncontroversial" organizations or persons is as unworkable as it is unsound. The very notion that by private suits against Members of Congress courts should supervise Congressional investigations, permitting "third party" subpoenas for financial records relating only to "noncontroversial" organizations, flies in the face of the Speech or Debate Clause principles established by this Court. The First Amendment, in any event, does not distinguish between "controversial" and "noncontroversial" organizations, conferring associational privacy only on the former.

In sum, the holding of the court below, if upheld, will have the inevitable effect of blocking legislative committees from legitimately inquiring, through the use of compulsory process, into the financing of any organization a court might deem "controversial." Yet such inquiries are properly part of the due functioning of the legislative process. If some legislative abuse might be perceived—and it is hardly apparent whether the court below saw any—that is a matter for Congress itself, not the judiciary, as this Court's decisions under the Speech or Debate Clause make clear.

ARGUMENT

At issue here is the authority of federal courts to control the fact-finding processes of the United States Congress through private civil actions against Members and their aides. Prior to the decision below, the judiciary had observed the fundamental doctrine that courts should "not lightly interfer[e] with Congress' exercise of its legitimate powers," *Hutcheson* v. *United States*, 369 U.S. 599, 622 (1962), and had refused to enjoin the issuance or enforcement of a Congressional subpoena before its return.[34]

But in a decision opening the doors to lawsuits that would cripple the process of legislative inquiry, the

[34] In a series of earlier decisions, which were not brought to this Court for review, the Court of Appeals for the District of Columbia Circuit—the only jurisdiction where such suits can be brought (see *Liberation News Service* v. *Eastland*, 426 F.2d 1379 (2d Cir. 1970))—consistently rejected injunction and declaratory judgment actions by plaintiffs asserting the First Amendment rights of subpoenaed witnesses called to testify or produce documents before Congressional committees. See *Pauling* v. *Eastland*, 288 F.2d 126 (1960); *Cole* v. *McClellan*, 439 F.2d 534 (1970); *Ansara* v. *Eastland*, 442 F.2d 751 (1971); *Sanders* v. *McClellan*, 463 F.2d 894 (1972). See also *Hearst* v. *Black*, 87 F.2d 68 (D.C. Cir. 1936).

court of appeals has breached this principle and authorized equitable relief against Congressional defendants. To justify this on the basis that the subpoena is addressed to a third party and the party asserting the constitutional claim thus may have no alternative method of obtaining judicial review prior to compliance, is to emphasize how far-reaching the intrusion promises to be. Congressional committees are constantly subpoenaing witnesses to testify or produce documents in regard to other persons or legal entities.[35] Yet those who are the subject of such inquiries are now invited to take Members of Congress to court, invoke a constitutional claim, and frustrate the legislative process in the interim while the case winds its way to final judgment. Now the courts will intervene so long as the plaintiff suing for injunctive relief is an organization or other "target" of the investigation whose interests will be affected by the testimony given or the documents produced and can claim, along the lines sustained below, that its constitutional objection will be lost if not considered by a court prior to compliance with the subpoena.

As we argue below, this extraordinary result violates well-established principles concerning the immunity of Congressmen and their aides from judicial control and cannot be justified on the First Amendment grounds invoked by the court of appeals.

[35] See Sky, *Judicial Review of Congressional Investigations: Is There An Alternative to Contempt?*, 31 Geo. Wash. L.Rev. 389, 408 (1963) (Mr. Sky was Assistant Counsel to the Antitrust Subcommittee of the House Judiciary Committee, *id.* at 399 n.*).

I.

The Activities of the Congressional Defendants in Subpoenaing Bank Records Were Protected from Judicial Interference by the Speech or Debate Clause

A.

Subpoenaing records and documents has long been considered something "generally done in a session of Congress by one of its members in relation to the business before it" and is therefore protected legislative activity

Article I, section 6 of the Constitution provides that "for any Speech or Debate in either House * * * [Senators and Representatives] shall not be questioned in any other place." On eight prior occasions this Court has considered questions relating to the scope and application of the Speech or Debate Clause. *Doe* v. *McMillan*, 412 U.S. 306 (1973); *Gravel* v. *United States*, 408 U.S. 606 (1972); *United States* v. *Brewster*, 408 U.S. 501 (1972); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *United States* v. *Johnson*, 383 U.S. 169 (1966); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). The principles established in these cases govern the decision here and, we submit, lead to the conclusion that courts may not enjoin Congressmen and their aides from issuing or enforcing subpoenas, any more than courts may enjoin Congressmen from considering and passing legislation.

The reasons for the Speech or Debate Clause at the least suggest as much. Designed to prevent "intimidation by the executive and accountability before a possibly hostile judiciary,"[36] the Clause reinforces the

[36] *United States* v. *Johnson*, *supra*, 383 U.S. at 181; *Gravel* v. *United States*, *supra*, 408 U.S. at 617; *Powell* v. *McCormack*, *supra*, 395 U.S. at 502; *Doe* v. *McMillan*, 412 U.S. at 311, 316.

separation of powers and protects legislative independence and integrity.[37] As to the judicial branch, the protection afforded by the Clause is "not only from the consequences of litigation's results but also from the burden of defending" suits.[38] Indeed, the Clause "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon the conclusions of a pleader," *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377.[39]

Never in its history has this Court allowed a civil suit, challenged under the Speech or Debate Clause, to proceed against Senators or Representatives. In each of the prior cases raising the question whether allegedly unconstitutional actions by legislators subjected them to such suits, the Court has held that the legislators should be dismissed as parties.[40] Moreover, while

[37] *United States* v. *Johnson*, *supra*, 383 U.S. at 178; *United States* v. *Brewster*, *supra*, 408 U.S. at 525; *Gravel* v. *United States*, *supra*, 408 U.S. at 617.

[38] *Dombrowski* v. *Eastland*, *supra*, 387 U.S. at 85; *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377; *Powell* v. *McCormack*, *supra* 395 U.S. at 502-503, 505.

[39] The Speech or Debate Clause was adopted by the Founders without debate or opposition. See 5 Debates on the Federal Constitution 406 (Elliot ed. 1876); 2 Farrand, Records of the Federal Convention of 1787, p. 246 (1966 ed.). The historical antecedents of the Clause are discussed in Mr. Justice Frankfurter's opinion for the court in *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 372-375; and in *United States* v. *Johnson*, *supra*, 383 U.S. at 177-183 (Mr. Justice Harlan). See also *Powell* v. *McCormack*, *supra*, 395 U.S. at 502-503; and *Gravel* v. *United States*, *supra*, 408 U.S. at 652-659 (Mr. Justice Brennan, dissenting).

[40] See *Kilbourn* v. *Thompson*, *supra*; *Tenney* v. *Brandhove*, *supra*; *Dombrowski* v. *Eastland*, *supra*; *Powell* v. *McCormack*, *supra*; *Doe* v. *McMillan*, *supra*. (The remaining three Speech or Debate Clause cases involved criminal proceedings (*United States* v. *Johnson*, *supra*; *United States* v. *Brewster*, *supra*; *Gravel* v. *United States*, *supra*.))

at one time there may have been some doubt regarding the extent to which the Clause applied to Congressional aides,[41] the Court ruled unanimously in *Gravel* v. *United States*, *supra*, 408 U.S. at 618,[42] "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."[43]

In this, as in other cases involving the Clause, the Court has determined "that the legislative privilege will be read broadly to effectuate its purpose."[44] Although the Clause speaks only of "Speech or Debate" the Court has never so confined its protections.[45] Instead, whether Congressmen—and, therefore, their aides—are covered in the context of a civil suit depends on whether the challenged conduct constitutes something "generally done in a session of the House by one of its members in relation to the business before it."[46]

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[41] Compare *Kilbourn* v. *Thompson*, *supra*; *Dombrowski* v. *Eastland*, *supra*, 387 U.S. at 85; *Powell* v. *McCormack*, *supra*.

[42] See also *id.* at 629 (Mr. Justice Stewart, dissenting in part); at 633 (Mr. Justice Douglas, dissenting); and *id.* at 648 (Mr. Justice Douglas and Mr. Justice Marshall, dissenting).

[43] Accord *Doe* v. *McMillan*, *supra*, 412 U.S. at 320.

[44] *United States* v. *Johnson*, *supra*, 383 U.S. at 180; *Gravel* v. *United States*, *supra*, 408 U.S. at 618, 624; *Doe* v. *McMillan*, *supra*, 412 U.S. at 311.

[45] *Gravel* v. *United States*, *supra*, 408 U.S. at 617; *Powell* v. *McCormack*, *supra*, 395 U.S. at 502.

[46] *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 204, quoted with approval in *United States* v. *Johnson*, *supra*, 383 U.S. at 179; *United States* v. *Brewster*, *supra*, 408 U.S. at 509, 512-513; *Gravel* v. *United States*, *supra*, 408 U.S. at 617-618; 649-650 (dissenting opinion); *Powell* v. *McCormack*, *supra*, 395 U.S. at 502; *Doe* v. *McMillan*, *supra*, 412 U.S. at 311.

In the instant case, the only activity suggested by the court below as being a non-legislative act—subpoenaing records[47]—falls squarely within the foregoing definition of protected conduct consistently repeated by this Court. As the Court stated in *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927), "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."

Requiring the production of documents is not only "essential," but also something "generally done" in a legislative session. Indeed, there are few other attributes of the legislative process that historically are so firmly ingrained. When in 1689 British Parliamentary committees first were employed as necessary parts of the legislative process they were granted the power to send for persons and papers.[48] English history is replete with other examples from that time forward, so much so that one commentator concluded a century ago that "it is hardly worthwhile to enumerate later instances of exercising a right which had become indisputable and, even before it rested on the basis of precedent, could not reasonably be denied to those who might advise, remonstrate, and impeach."[49] In short, a "legislative committee of inquiry vested with power to summon witnesses and compel the production of records and papers is an institution rivalling most legislative institutions in the antiquity of its origin."[50]

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[47] App. 67.

[48] Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 162-164 (1926).

[49] *Hallam, Constitutional History of England*, 307-308 (5th ed. 1867), quoted in Landis, *supra*, at 164 & n.44.

[50] Landis, *supra*, at 159.

In the early history of this country, as in England, requiring, and enforcing process to compel, the production of documents was something "generally done" by a legislative body "in relation to the business before it." [51] In 1781 the Virginia House of Delegates, for example, conferred upon its standing committees on religion, privileges, and elections, courts of justice, and trade, the power "to send for persons, papers and records for their information." [52] And the first Congressional investigating committee, established in 1792, exercised the power "to call for such persons, papers and records, as may be necessary to assist their inquiries" [53] into the ambush and defeat of General St. Clair's army a year earlier.[54]

From the time of the General St. Clair investigation [55] through the recent Watergate hearings [56] Congressional committees have compelled the attendance of witnesses and the production of books and records.[57] And in view of the fact that the earliest Parliamentary

[51] See generally, Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U.Pa.L.Rev. 691 (1926).

[52] Potts, *supra*, at 716.

[53] 3 Ann. Cong. 490-494 (1792).

[54] See I Morrison, Commager & Leuchtenburg, *The Growth of the American Republic* 305-306 (6th ed. 1969).

[55] See, *e.g.*, the other examples cited and discussed in Landis, *supra*, at 168-212.

[56] See *Hearings before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong., 1st Sess. (1973); S. Res. 60, 93d Cong., 1st Sess., § 3(a)(5) (1973).

[57] It has been estimated that from 1792 to 1954 there have been 600 special Congressional investigations alone. Van Alstyne, *Congressional Investigations*, 15 F.R.D. 471, 472 (1954).

inquiries,[58] as well as the first Congressional investigation, were devoted to investigations into the conduct of the military, it is perhaps ironic that in this case the Senate Subcommittee's investigation, which dealt with USSF's activities affecting servicemen, touched on the same subject.

In sum, as this Court stated in *McGrain* v. *Daugherty*, 273 U.S. 135, 161 (1927), "power to secure needed information by [compulsory process] has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the colonial legislatures before the American Revolution and a like view has prevailed and been carried into effect in both houses of Congress * * *." This history demonstrates that the Congressional actions challenged here—seeking the production of documents through a subpoena *duces tecum*—are well-within the protection of the Speech or Debate Clause. These surely are—and for centuries have been—activities "generally done in a session of the House by one of its members in relation to the business before it." [59] They are essential acts in the legislative fact-finding process without which Congressional committees could not effectively function, and plainly are not "beyond the apparent needs of the '*due* functioning of the [legislative] process.'" *Doe* v. *McMillan*, *supra*, 412 U.S. at 317, quoting *United States* v. *Brewster*, *supra*, 408 U.S. at 516.

[58] Landis, *supra*, at 162.

[59] Cases cited note 46 *supra*.

B.

The Speech or Debate Clause cannot be disregarded because the congressional activity might be found unconstitutional by a court or because the subpoena was directed to a third party who could be expected to comply

As against this, the court below quoted extensively from the decisions of this Court regarding the Speech or Debate Clause and suggested in conclusion that the Senators and Chief Counsel of the Subcommittee had no protection *because* "the forced surrender by the bank of the subpoenaed records in response to the subpoena would invade the constitutional rights of the plaintiffs" (App. 78). Aside from the fact that the record is barren of any evidence that the Senators would have had to "force" the bank to comply, the court's rationale for disregarding the Clause is erroneous.

To hold that the Clause provides no protection to Congressmen if their actions are found to be unconstitutional is to emasculate the Clause itself. It means that Congressional defendants would come under the Clause only if they would in any event prevail on the merits, which of course is no protection at all. This is why the Court ruled in *Tenney* v. *Brandhove, supra*, 341 U.S. at 377, that legislators cannot be forced to defend actions "upon a conclusion of the pleader"; otherwise "the privilege would be of little value."[60]

[60] As Mr. Justice Rehnquist (joined by the Chief Justice, Mr. Justice Stewart and Mr. Justice Blackmun) stated in his concurring and dissenting opinion in *Doe* v. *McMillan, supra*, 412 U.S. at 339:

> A supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed.

Contrary to the majority below (App. 60), it is no answer to say that the rule must be different when, as here, a party seeks judicial intervention on the basis that the subpoena is directed to a third party, who can be expected to comply, and that such compliance would invade plaintiff's constitutional rights in view of the purpose and effect of the subpoena. As this Court has held,[61] "The claim of an unworthy purpose does not destroy the privilege."[62] Congressmen and their aides are immune from suit "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional * * *." *Doe* v. *McMillan, supra*, 412 U.S. at 312-313. That the Speech or Debate Clause, if applied, would preclude respondents from invoking the aid of the judiciary is not a reason for holding the Clause inapplicable.[63] It is instead merely a restatement of the principle, established by this Court, that the Clause confers immunity upon Congressional defendants for their legislative activities,

[61] *Tenney* v. *Brandhove, supra*, 341 U.S. at 377; the Court continued after the quoted passage: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators."

[62] See the amended complaint in *USSF* (App. 16), which alleged that the "sole purpose for the issuance of the aforesaid subpoena by defendant Committee members and staff is to harass, chill, punish and deter plaintiffs" in the exercise of their First Amendment rights.

[63] Compare the statement by the court of appeals majority (App. 60):

> *Here the plaintiffs have no alternative means to vindicate their rights.* They cannot contest a subpoena issued on the Chemical Bank before the Committee or before the Senate, and they cannot force the bank's uninvolved officials to run the risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment rights.

regardless whether a court might determine upon a trial that their actions were unconstitutional.

Nor is the following dictum from *Gravel* v. *United States*, *supra*, 408 U.S. at 621, relied upon by the court of appeals,[64] to the contrary:

> On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States* v. *Johnson*, 383 U.S. 169 (1966).

As the Court there explained, no Speech or Debate Clause protection attaches because in such circumstances "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." *Ibid.*

By contrast, a trial such as that contemplated by the court below necessarily entails an inquiry into the purposes or motives of the Congressmen responsible for the subpoena since otherwise there could be no constitutional objection. Surely the mere fact that a bank's records relating to a corporation have been subpoenaed does not render unconstitutional the underlying actions by the Congressional defendants or supply a reason for judicial intervention. In analogous contexts the lower federal courts have held on numerous occasions that "customers have no standing to

[64] App. 64-65, 78.

object to subpoenas requiring their bank to produce records of the customers' accounts," *Harris* v. *United States*, 413 F.2d 316, 318 (9th Cir. 1965) (citing cases). Thus, when independent agencies such as the Securities Exchange Commission[65] or agencies of the Executive Branch such as the IRS[66] or arms of the Judicial Branch[67] such as a grand jury[68] seek access to bank records, the customer has no standing to protest in court.[69]

This being so when agencies of the Executive and Judicial Branches issue subpoenas for bank records, it is plainer still that there can be no judicial interference with such subpoenas *duces tecum* from the

[65] *E.g.*, *Galbraith* v. *United States*, 387 F.2d 617 (10th Cir. 1968) (SEC civil investigation).

[66] *E.g.*, *O'Donnell* v. *Sullivan*, 364 F.2d 43 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966) (IRS summons); *Application of Cole*, 342 F.2d 5, 8 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965).

[67] *Levine* v. *United States*, 362 U.S. 614, 617 (1960).

[68] *E.g.*, *Harris* v. *United States*, *supra*.

[69] See also *McMann* v. *SEC*, 87 F.2d 377, 378-379 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937), where Judge Learned Hand refused to enjoin stockbrokers from complying with an SEC subpoena *duces tecum* seeking copies of McMann's account. In response to plaintiff McMann's arguments that the information was privileged, confidential and constitutionally protected, Judge Hand stated:

> But the very fact that testimonial privileges are based upon specified confidential relations, is proof that they do not extend to all, and it hardly needs to be said that nobody by contract, express or implied, can abridge public duties. So far as the principal's rights may be classed as "property" at all, they are subject to this condition. The attempted investigation may indeed lack legal sanction. *Hearst* v. *Black* (App. D.C.) 87 F.(2d) 68; *Brex* v. *Smith*, 104 N.J.Eq. 386, 388, 146 A.34; and the officer who conducts it will then stand no better than any other interloper; but if it be duly authorized, it is no more subject to obstruction than judicial proceedings.

Legislative Branch, whose Members alone are explicitly granted immunity by the Constitution.[70] No exception in regard to the Senate Subcommittee's subpoena in this case can be justified on the basis of USSF's charges that the "sole purpose for the issuance of the * * * subpoena by the defendant Committee members and staff is to harass, chill, punish and deter plaintiffs in the exercise of their rights and duties under the First Amendment."[71] The invitation for judicial inquiry extended by such claims[72] cannot be accepted since the Speech or Debate Clause forecloses the courts from examining the reasons why Members of Congress and their aides have chosen to engage in the questioned legislative activity.[73]

[70] The Court has of course upheld immunity for the judiciary in *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967), stating: "This immunity applies even when the judge is accused of acting maliciously and corruptly * * *." See also *O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

[71] Amended Complaint ¶ III, 13 (App. 16). Similarly, the next paragraph claimed that the Subcommittee's subpoena "is part of a broad scheme by various branches of the Government to use and abuse the power of subpoena to stifle freedom of the press * * *." *Ibid.*

[72] These allegations by USSF are quite similar to those made by the plaintiff in *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 371, where this Court affirmed the district court's dismissal of the complaint.

[73] *United States* v. *Brewster*, *supra*, 408 U.S. at 525, 528 ("It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts."); *id.* at 534-535 (Mr. Justice Brennan, joined by Mr. Justice Douglas, dissenting); *Gravel* v. *United States*, *supra*, 408 U.S. at 621 (in suits against Congressmen and their aides, the Clause precludes inquiry into the "motives or purposes underlying" legislative acts); *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377 (it is "not consonant with our scheme of government for a court to inquire into the motives of legislators").

Moreover, despite USSF's allegations,[74] there is nothing in this record—in the authorizing resolutions, in the nature of the inquiry or otherwise—to indicate that the Senate Subcommittee's investigation into bank records relating to USSF was anything but a legitimate legislative investigation and, indeed, the court majority never suggested the contrary. As Judge MacKinnon pointed out in dissent (App. 96-97):

> The Subcommittee and the Congress have a valid legislative interest in ascertaining whether any of the money used to finance any questionable activities of the USSF came from foreign sources or subversive organizations. The activities of coffee houses and newspapers supported by the USSF were designed to, and could not possibly have failed to some extent "to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States." Such activities might have caused or attempted to cause insubordination, disloyalty, or refusal of duty, and as such would have constituted violations of 18 U.S.C. § 2387(a) * * *.
>
> If some of the contributors to the USSF were from "foreign principals," there was a definite congressional interest in determining whether the Foreign Agents Registration Act had been complied with. 22 U.S.C. § 611 *et seq.* Compliance with the Internal Security Act, 50 U.S.C. § 781 *et seq.*, as the enabling resolution stated, was also a legitimate objective of the investigation by the Subcommittee. In addition, the subject matter of these statutes was also a legitimate subject of congressional inquiry in order to determine whether these laws should be retained, repealed or amended to meet new conditions, or whether new laws were needed. It would also be a permissible goal of the

[74] See text at note 71 *supra*.

investigation to determine whether any of the contributors has been misled by the use of the name "United States" in the name of the organization into believing that the USSF was sponsored or approved by the Government of the United States or by the United States Military services or any other United States department or agency. Cf. 18 U.S.C. § 713.

The condition and efficiency of the military is a matter of vital concern to Congress, particularly when large scale foreign military operations, such as were under way in 1970, were being undertaken.[75]

Of course, it is immaterial that the authorizing resolutions did not identify whether or what legislation was contemplated by the Senate Subcommittee since "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded."[76]

Respondents have also told this Court that what is involved here is a legislative attempt "to evade court review by issuing subpoenas to third parties who can-

[75] The criminal statute (18 U.S.C. § 2387(a)), cited by Judge MacKinnon, provides:

> (a) Whoever, when the United States is at war, willfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies; or
>
> Whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstructs the recruiting or enlistment service of the United States, to the injury of the service or the United States, or attempts to do so—
>
> Shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

[76] *In re Chapman*, 166 U.S. 661, 670 (1897).

not be expected to run the risk of contempt to protect the constitutional rights of the real party in interest * * *."[77] But the subpoenas were in no way "indirect": they were issued to the owners and custodians of the documents involved.[78] None of the courts below found any "attempt to evade court review" and the record lends no support to such an assertion. Moreover, it simply does not follow that because Congress can seek the aid of the judiciary through contempt prosecutions instituted by the Department of Justice,[79] the judiciary should ignore the Speech or Debate Clause and permit suits against Members of Congress when the "opportunity" to defend a contempt prosecution is unlikely or unavailable.[80] That was precisely the situation in *Tenney* v. *Brandhove, supra,* where this Court affirmed the trial court's dismissal of a private civil action against legislators despite the fact that the plaintiff had no other way to redress the legisla-

[77] Brief in Opposition to the Petition for a Writ of Certiorari, p. 18.

[78] The Senate Subcommittee could hardly have sought production of the bank's records by directing a subpoena to USSF. There is, for example, nothing to indicate that USSF retained copies of checks deposited with the bank that were payable to USSF.

[79] See 2 U.S.C. 192, 194; *Watkins* v. *United States*, 354 U.S. 178 (1957); *Uphaus* v. *Wyman*, 360 U.S. 72 (1959); *Barenblatt* v. *United States*, 360 U.S. 109 (1959).

[80] The implicit premise of respondents' argument—that there must always be an opportunity for judicial review of legislators' actions allegedly violating constitutional rights—has been expressly rejected by this Court not only in *Tenney* v. *Brandhove, supra,* but also in *Doe* v. *McMillan, supra*, 412 U.S. at 312-313 (Speech or Debate Clause immunity protects Congressmen "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional.").

tors' alleged infringement of "his constitutional rights of free speech." 341 U.S. at 371.[81]

USSF further claims that the protection of the Speech or Debate Clause should be withdrawn to allow judicial intervention because otherwise the bank's compliance with the Senate Subcommittee's subpoena will result in a decrease of donations to USSF. Only last term this Court dealt with a similar contention and rejected it. In *Alexander* v. *"Americans United," Inc.*, — U.S. — (1974) (94 S. Ct. 2053),[82] a non-profit cor-

[81] See in addition to note 73, *supra*, Mr. Justice Douglas dissenting in *Gravel* v. *United States*, *supra*, 408 U.S. at 635-636:

> Whether a particular document is relevant to the inquiry of the committee may be questioned by the Senate in the exercise of its power to prescribe rules for the governance and discipline of wayward members. But there is only one instance, as I see it, where supervisory power over that issue is vested in the courts, and that is where a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range. See *Uphaus* v. *Wyman*, 360 U.S. 72; *Kilbourn* v. *Thompson*, *supra*, at 190.
>
> In all other situations, however, the judiciary's view of the motives or germaneness of a Senator's conduct before a committee is irrelevant. For, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney* v. *Brandhove*, 341 U.S. 367, 377. If there is an abuse, there is a remedy; but it is legislative, not judicial.

See also *Fischler* v. *McCarthy*, 117 F. Supp. 643, 650 (S.D.N.Y.), aff'd, 218 F.2d 164 (2d Cir. 1954) (per curiam) (the "legislature cannot be compelled to submit to the prior approval and censorship of the judiciary before it may ask questions or inspect documents through its investigating subcommittees, or even before it enacts legislation * * * any more than the judiciary can be compelled by the legislature to submit its rulings or decisions for legislative approval.").

[82] See also *Bob Jones University* v. *Simon*, — U.S. — (1974) (94 S.Ct. 2038).

poration sought injunctive and declaratory relief against the IRS's revocation of its federal tax-exemption, claiming *inter alia* that the government's action violated plaintiff's First Amendment rights, that contributions to the organization would decrease as a result and that as a practical matter only an injunction could prevent this injury. Although recognizing that the organization would be irreparably harmed, this Court held that the Anti-Injunction Act (26 U.S.C. 7421(a)) barred judicial intervention and that the "constitutional nature" of the organization's claim was of no consequence. 94 S.Ct. at 2058-2059. Likewise, the decision below cannot be justified on the basis that USSF's contributions may diminish. The bar to court action here is not simply a federal statute but a constitutional provision—the Speech or Debate Clause —and, as we have argued above, the challenged activities of the Congressional defendants fall squarely within the protection of that constitutional provision.

II.

The Subcommittee's Actions Were Not Transformed Into Non-Legislative Acts, Barred by the First Amendment, Merely Because Its Subpoena to the Bank Would Have Disclosed Records Relating to USSF

A.

USSF's claim of associational privacy in the bank's records is tenuous and does not justify a court's withdrawing Speech or Debate Clause protection to allow civil suits against congressmen and their aides

While what has been said above demonstrates, we submit, that the Speech or Debate Clause forecloses civil actions against Congressmen and their aides in the circumstances presented here, respondents' First Amendment claims illustrate even further the error

of the court below and the problems of judicial administration that adherence to its decision would entail.

It is important to emphasize that the records sought here by the Subcommittee belonged to the bank, not USSF, and the subpoena for them did not transgress any legal privilege such as attorney-client or doctor-patient or the expectation of privacy that arises from these relationships. Whatever the practice in Switzerland, the courts in this country have never recognized a banker-customer privilege.[83] See *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21 (1974).

In *Donaldson* v. *United States*, 400 U.S. 517 (1971), which involved an IRS summons directed to a third-party seeking checks and vouchers relating to the taxpayer, the Court held that the taxpayer could not intervene because he had "no proprietary interest of any kind" in the material sought and his only interest was to overcome the third-party's "willingness, under summons, to comply and to produce records." *Id.* at 531-532.[84] The records sought in *Donaldson* were of course the same kind of records sought by the Congressional subpoenas here. Indeed, even when a taxpayer relinquishes only custody, not ownership, of

[83] See in addition to the cases cited at notes 65 to 69, *supra*, *Foster* v. *United States*, 265 F.2d 183, 187-188 (2d Cir. 1959), *cert. denied*, 360 U.S. 912; *United States* v. *Bank of Commerce*, 405 F.2d 931, 934 (3d Cir. 1969) (disapproved in *Donaldson* v. *United States*, 400 U.S. 517, 530 (1971), on the ground that the taxpayer-customer has no right of intervention); *Schultz* v. *Rayunce*, 350 F.2d 666 (7th Cir. 1965), *cert. denied*, 382 U.S. 919; *United States* v. *Gross*, 416 F.2d 1205, 1212-1213 (8th Cir. 1969) (opinion by Mr. Justice—then Judge—Blackmun).

[84] See also *Couch* v. *United States*, 409 U.S. 322 (1973), holding that the taxpayer could not intervene in an IRS summons proceeding to prevent her accountant from producing her "books, records, bank statements, cancelled checks" and other documents, despite the taxpayer's contention that this material was confidential and privileged.

these kind of records to a third party, the Court has refused to recognize any right of the taxpayer to prevent the third party's turning the records over to the IRS pursuant to a summons. *Couch* v. *United States*, *supra*. In language that is as applicable to the United States Congress as it was to the IRS, the Court in *Donaldson* concluded that if taxpayers had a right to intervene when the summons sought production of such records from a third party, it "would unwarrantedly cast doubt upon and stultify the Service's every investigatory move." *Ibid.*[85]

Moreover, the bank's records regarding its financial transactions with USSF are doubtless familiar to the bank, including its officers and its numerous employees. If the bank chose to produce the information voluntarily, without subpoena, there would be no basis for a constitutional claim. On what ground, then, is there a greater invasion of the right of free association if compulsory process is used to obtain the information voluntarily disclosed to the commercial institution? Indeed, USSF's argument that the Senate Subcommittee is barred from obtaining this information because of the effect on donations, turns not at all on how the Subcommittee would discover the data. The argument brooks no distinction between the bank subpoena here or, for example, voluntary testimony about USSF's finances from one of its former officers. It is a claim for an absolute shield, erected by the courts, preventing any Congressional investigation that would uncover information about the organization's financing

[85] See also Mr. Justice Douglas' concurring opinion, 400 U.S. at 537: "But it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress." (Mr. Justice Douglas' remarks were directed to claims under the Fourth or Fifth Amendments.)

even when, as here, there is nothing to show that the investigation was other than a legitimate legislative inquiry. It is a claim which, if upheld, would thrust the judiciary into the position of supervising the due functioning of the legislative branch in civil actions against its Members—precisely what the Speech or Debate Clause was designed to prevent.

In addition to the facts that the bank and its employees are familiar with the information USSF desires to keep from Congress and that the bank's records could be discovered by other investigative bodies, as we discussed above,[86] USSF has undoubtedly already disclosed some of this information in its annual federal tax returns since a tax-exempt corporation must list contributions over $5,000 and the names and addresses of these contributors.[87] The only donor USSF claimed to have lost after the Subcommittee issued its subpoena had been contributing $10,000 per year.[88] (It appears just as likely, indeed far more likely, that this donor ceased giving to USSF because of the IRS's threatened revocation of USSF's tax-exemption, which had been publicized.[89]) The information on USSF's tax returns with respect to this donor and others in the same class is already available to at least three Com-

[86] See pp. 30-32, 38 *supra*.

[87] See Treas. Reg. 1.6033-2(a)(ii)(f)(1974) (on its annual information return, the tax exempt organization must list "The total of the contributions, gifts, grants and similar amounts received by it during the taxable year, and the names and addresses of all persons who contributed, bequeathed, or devised $5,000 or more (in money or other property) during the taxable year.")

[88] See note 17 *supra*.

[89] See note 19 *supra*. As to the effect of revocation of tax-exempt status on contributions to a non-profit organization, see *Bob Jones University* v. *Simon*, *supra*; and *Alexander* v. *"Americans United," Inc.*, *supra*.

mittees of Congress upon their request to the Secretary of the Treasury.[90]

Thus, the Senate Subcommittee's actions in this case were not transformed into non-legislative acts, prohibited by the First Amendment, merely because its subpoena to the bank would have disclosed records relating to USSF. As in *Uphaus* v. *Wyman*, 360 U.S. 72, 80 & n.7 (1959), where a state legislative committee sought the guest lists of an organization which had maintained a somewhat less extensive guest register open to inspection by police authorities, USSF's claim of associational privacy with respect to the documents covered by the subpoena is "tenuous at best."

B.

This Court's decisions on freedom of association do not support the judgment of the Court of Appeals authorizing injunctions against the congressional defendants to prevent receipt of the subpoenaed bank records

Decisions such as *NAACP* v. *Alabama*, 357 U.S. 449 (1958),[91] holding that it would infringe upon the freedom of association for state authorities to compel dis-

[90] See 26 U.S.C. 6103(d)(1)(A), which provides:

> The Secretary and any officer or employee of the Treasury Department, upon request from the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a select committee of the Senate or House specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution, shall furnish such committee sitting in executive session with any data of any character contained in or shown by any return.

The Joint Committee on Internal Revenue Taxation has the same right to obtain data and inspect returns and may submit relevant or useful information so obtained to the Senate or the House. 26 U.S.C. 6103(d)(2).

[91] See *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

closure of the NAACP's membership lists, do not support a contrary conclusion. For the reasons discussed above, the bank's records sought here are hardly the equivalent of confidential membership lists, which were sought directly from the NAACP or its employees and which the NAACP evidently had not given, in whole or in part, to other state authorities or private entities.

Moreover, the state officials in those cases sought the NAACP's membership lists for improper purposes in view of the lack of connection between the lists and the state's asserted need for them, as the record revealed.[92] There is no such proof here, nor could there be in view of the prohibition in the Speech or Debate Clause against judicial scrutiny of a Congressman's purpose or motive in performing his legislative activities.[93] In addition, *Doe* v. *McMillan*, *supra*, 412 U.S. at 312, makes clear that legislative immunity attaches regardless whether a court might decide that the legislator's acts were not wholly necessary. In response to the argument that the defendant Congressmen violated plaintiffs' constitutional rights by inserting in their report confidential material that was "unnecessary and irrelevant to any legislative purpose," the Court there stated: "Cases in this Court, however, from *Kilbourn* to *Gravel* pretermit the imposition of liability on any such theory. * * * Although we might disagree with the Committee as to whether it was nec-

[92] See, *e.g.*, *Gibson* v. *Florida Legislative Investigating Committee*, *supra*, 372 U.S. at 551. As this Court stated in *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972), distinguishing the *NAACP* v. *Alabama* line of cases, "Nor did the grand juries attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether a crime had been committed * * *."

[93] See note 73 *supra*.

essary, or even remotely useful, to include [the material in the report], we have no authority to oversee the judgment of the Committee in this respect or to impose liability on its Members if we disagree with their legislative judgment." 412 U.S. at 312-313.[94]

Relying upon the *NAACP* v. *Alabama* line of cases, the court below[95] and respondents in this Court[96] draw a line between Congressional subpoenas for banks' records relating to "controversial" organizations and subpoenas regarding "non-controversial" organizations, finding only the latter constitutionally permissible. The obvious unworkability of such a distinction, without more, suggests its unsoundness.[97] Beyond this, the proposal that courts should supervise Congressional investigations to allow "third-party" subpoenas for financial information regarding only "noncontrover-

[94] This is why the Court below erred in relying upon *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd*, 393 U.S. 14, a case in which a state prosecutor, acting as a one-man grand jury, subpoenaed bank records relating to the Arkansas Republican Party. The district court expressly rested its decision enjoining the State prosecutor on the ground that the information sought was not "reasonably relevant to defendant's investigation of vote buying," 283 F. Supp. at 257, and this Court affirmed without opinion.

[95] App. 68-75.

[96] Brief in Opposition to the Petition for a Writ of Certiorari, pp. 3, 19, 19A.

[97] For example, do the bank's records regarding USSF become proper objects of a Congressional subpoena if USSF loses its alleged controversiality with the passing years? The very fact of a Congressional investigation may render otherwise obscure organizations "controversial." Does this sanction a court's intervention? Cannot trade associations or labor unions be considered "controversial" in some circumstances? Is it not true that the very facts that render a group "controversial" may properly spur a Congressional investigation? What are the standards a court should use to decide whether an organization is "controversial"?

sial" organizations flies in the face of the Speech or Debate Clause principles established by this Court in the series of decisions discussed above.[98] And in any event, this dichotomy between organizations deeming themselves "controversial" and those outside the classification cannot serve to distinguish the circumstances presented here from the usual case involving the subpoenaing of bank records; this Court has never held that corporations such as USSF have any greater First Amendment rights than others.

In sum, the holding of the court of appeals will have the inevitable effect of blocking legislative committees from legitimately inquiring, through the use of compulsory process, into the financing of any organization that a court might term "controversial." Surely the question whether, for example, tax-exempt organizations are funded directly or indirectly by agents of foreign governments is one that Congress has the power and responsibility to investigate. Exposure of such financing may, as USSF argued below, deter financial contributions to these organizations, particularly if the donor is in fact connected with a foreign government; yet on that ground alone the court of appeals has now held that Congress is barred from learning the facts. If the court below perceived some abuse, which is hardly apparent from the record or its opinion, that is a matter for Congress, not the judiciary, as this Court's decisions under the Speech or Debate Clause have made clear.[99] In all this, it is well to recall the

[98] See pp. 22-37 *supra*.

[99] See, e.g., *Tenney* v. *Brandhove*, *supra*, 408 U.S. at 378, where the Court stated:

> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or corrupting such abuses.

admonishment of Mr. Justice Holmes years ago: "it must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U.S. 267, 270 (1904).

See also *Doe* v. *McMillan*, *supra*, 412 U.S. at 312-313; *Gravel* v. *United States*, 408 U.S. at 636 (Mr. Justice Douglas, dissenting: "If there is an abuse there is a remedy; but it is legislative, not judicial."); *United States* v. *Brewster*, *supra*, 408 U.S. at 534-535 (Mr. Justice Brennan, joined by Mr. Justice Douglas, dissenting).

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed and respondents' suits ordered dismissed.[100]

Respectfully submitted,

HERBERT J. MILLER, JR.
NATHAN LEWIN
A. RAYMOND RANDOLPH, JR.
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D.C. 20036
Attorneys for Petitioners

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[100] Respondents have argued in this Court that the House Committee cases are moot because the subpoenas are four years old, the Session of Congress has expired, and, unlike the Senate, the House is not a continuing body.

Respondents did not present this argument to the court of appeals although it was equally applicable at that time. We suggest that if respondents are correct, the proper course is for this Court to vacate as moot the judgment below relating to the House cases. This disposition would not of course affect the *USSF* case.

In any event, we do not believe the House cases are moot. The Committee would have been flouting the judiciary if it had repeatedly issued subpoenas with respect to which preliminary injunctions had been entered (*supra* note 29).